Supreme Court, U.S.
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No. 10-328

IN THE

Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

This case is a good vehicle for deciding important questions about the separation of powers and the scope of the political question doctrine. Certiorari should therefore be granted. In the alternative, the Court should hold the petition until it decides *American Electric Power Co. v. Connecticut*, No. 10-174, a case in which the Court recently granted certiorari to resolve (among other things) questions about the scope of the political question doctrine.

I. This Case Is An Appropriate Vehicle

The United States argues that this case is a poor vehicle for resolving the question presented because the concurring judges suggested, as an alternative rationale for affirmance, that Petitioners' claims are too insubstantial to state a federal question. Opp. at 8, 17. But a majority of the court below reached and rejected this proffered alternative basis for affirmance, and held that, but for the political question doctrine, Petitioners would be entitled to proceed with their claims in the district court. Pet. App. 29a. The United States has not filed a cross-petition on this issue. For these reasons, a holding by this Court reversing the decision below would result in further proceedings on the merits of Petitioners' claims, making this an appropriate case for deciding the justiciability question presented by the petition.

In any event, as explained in the petition, Petitioners' claims are far from insubstantial. *See* Pet. at 12–13 n.3. Most obviously, Petitioners have raised a colorable claim challenging agency action (including the CIA's denial of a request for a retraction) as arbitrary and capricious under the

Administrative Procedure Act.[1] And Petitioners also rely on well-settled law in asserting a non-monetary common-law claim against the United States for the torts of its employees.[2] There is no doubt that these

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[1] The United States tries to elide Petitioners' APA claim by asserting that Petitioners did not cite 5 U.S.C. § 706 in their pleadings. Opp. at 16 n.4. But the complaint put the United States on notice of the APA claim by citing 5 U.S.C. § 702, the APA provision granting a right to judicial review of agency action. *See* Pet. App. 104a. Both the district court and the court below understood that Petitioners were proceeding under the APA, *see* Pet. App. 63a-65a, 67a, 74a, 79a-82a, and much of the briefing below involved whether Petitioners had satisfied APA criteria like agency action and finality, *see, e.g.*, En Banc Br. of Appellants at 40–47; Br. for Appellee on Rehearing En Banc at 36–41; En Banc Reply Br. of Appellants at 22–25; Br. of Appellants at 18–21; Br. for Appellee at 40–43.

[2] The majority below acknowledged circuit precedent permitting "a plaintiff [to] obtain a retraction from the United States for defamation by one of its officers" under "[f]ederal . . . common law." Pet. App. 29a (quoting Pet. App. 74a–75a); *see also Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977) (en banc) ("declaratory and injunctive relief may be obtained against defamatory statements by government officials"). This Court, too, has recognized that plaintiffs contesting the accuracy of the government's designation of them as enemies of the United States have an equitable claim for "violat[ion of their] common-law right to be free from defamation." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (plurality op.). The United States says that *McGrath* is different than this case because the defendants in *McGrath* were individual officers (sued there in their official capacities), not the United States. Opp. at 17. But Petitioners here were entitled to name *either* the United States *or* the individual officers as defendants. *See* 5 U.S.C. § 702 ("action . . . stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States"); *id.* ("[t]he United States may be named as a

claims are substantial enough to get over the jurisdictional threshold. *See Bell v. Hood*, 327 U.S. 678, 682–83 (1946). Whether the causes of action can survive "a variety of hurdles" on a motion to dismiss (Opp. at 16 n.4) is a still-open question—one whose resolution has been foreclosed by the D.C. Circuit's erroneous holding that the political question doctrine bars the federal courts from entertaining this lawsuit.

II. This Case Raises Important Issues Warranting Review

This case warrants review for two reasons. First, by holding nonjusticiable a case involving no constitutional question, the court below expanded the political question doctrine beyond its traditional limits and thereby upset the constitutional allocation of powers between Congress and the President. Pet. at 19–24. Second, the decision below flouts this Court's recent rulings on the justiciability of enemy-combatant designations. Pet. at 15–19.

1. The political question doctrine has been understood, by courts and commentators alike, to preclude judicial review only of *constitutional* questions whose resolution the Constitution itself leaves to one of the political branches. Pet. at 20–22. The United States offers no response on the merits to Petitioners' showing that, in barring review of their APA claim and their defamation claim, the court below upset the Constitution's separation of powers

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(continued...)

defendant in any such action"); *id.* § 703 ("the action . . . may be brought against the United States, the agency by its official title, or the appropriate officer").

by improperly extending the political question doctrine to preclude judicial review of non-constitutional claims involving no constitutional questions. *Compare* Pet. at 19–23 *with* Opp. at 16. In so holding, the court below endorsed an approach, for this and future cases, that implicitly precludes Congress from constraining Executive conduct in certain spheres of activity, without grappling with the important and difficult separation-of-powers analysis that ought to inform such preclusion. This is a purely legal issue that is not at all "factbound" (Opp. at 8), and it warrants this Court's review.

The United States notes that there is no circuit split on this issue, but none of the Court's recent cases on the Constitution's structural protections have, so far as we can discern, involved such a split. *See, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3149 (2010). This reflects not only the rarity of such splits, but the need for this Court to be vigilant where one branch of government impinges on the authority of a coordinate branch, even when the potential encroachment seems "innocuous." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991). Where, as here, an approach adopted by a lower court would "*systematically* favor the Executive Branch over the Legislative Branch," Pet. App. 43a (Kavanaugh, J., concurring in the judgment) (emphasis added), the Court cannot afford to wait for an express circuit split to develop. This is especially so where, as here, the decision below represents a dramatic expansion of a doctrine beyond its conventionally understood outer limits. *See* Pet. at 20–22.

2. Even if the political question doctrine could preclude judicial review of non-constitutional questions, review is warranted here because the decision below cannot be reconciled with this Court's recent detainee cases. Pet. at 15–24. Those cases make clear that the factual basis of an enemy-combatant designation is justiciable. And judicial review of the factual basis for the government's designation of Petitioner Idris as a supporter of terrorists is all that Petitioners seek in this case.

The United States cannot persuasively distinguish the detainee cases. It suggests, as did the court below, that those cases turned on the fact that individuals were challenging their custody. Opp. at 13–14. But the political question doctrine does not focus on the nature of the harm to the plaintiff. Rather, it focuses on the nature of the "particular question posed." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Thus, while the relief sought here is different—Petitioners seek a judicial declaration and/or a retraction, not release from custody—the particular question posed is identical to the one posed in the detainee cases: the accuracy of assertions about an individual's affiliation with the enemy offered in justification of an earlier battlefield decision.

The United States contends that, in the detainee cases, the Court "was not reviewing the initial decision to capture; it was reviewing the decision to retain the detainee in custody," and that "[t]here is no comparable continuing conduct for a court to review here." Opp. at 14. To the contrary, Petitioners here are seeking review of the "continuing conduct" that occurred in the weeks following the

military attack on the El-Shifa plant—namely, the media campaign to publicly defame Petitioner Idris. *See* Pet. at 5–6. The lesson of the detainee cases is that such subsequent conduct, remote from the battlefield, is not immune from judicial review simply because it is based on the same justifications as the original battlefield decision. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 510, 512 (2004) (plurality op.) (noting that the "sole evidentiary support" for Hamdi's continuing detention was an affidavit describing "the facts and circumstances related to [Hamdi's] capture . . . and his detention by U.S. military forces"). Under the detainee cases, therefore, Petitioners' claims are plainly justiciable.[3]

III. In The Alternative, The Petition Should Be Held Pending Resolution of *American Electric Power Co. v. Connecticut*

Subsequent to the filing of the petition in this case, the Court granted certiorari in *American Electric Power Co. v. Connecticut*, No. 10-174, to resolve, *inter alia*, whether the political question doctrine

[3] The United States strives to portray the decision below as a narrow one that does not suggest that more formalized terrorist designations than the ones at issue here would be nonjusticiable under similar circumstances. Opp. at 12 n.2. But this distinction makes no sense because the D.C. Circuit's holding is premised upon the rationale that judicial review of the designation would call into question "the truth of the President's original account of the attack." Opp. at 11. Review of a more formalized designation would have exactly the same effect. Nor does it matter that more formalized designations may involve "statutes specifically providing for circumscribed judicial review." Opp. at 15 n.3. The political question doctrine derives from "separation of powers," *Baker*, 369 U.S. at 210, and Congress therefore cannot authorize judicial review of otherwise nonjusticiable questions.

bars common-law nuisance claims alleging that the defendants' emissions contributed to global climate change. The Court's decision in that case may materially impact the law applicable to this case, which would require the Court, consistent with its usual GVR practice, to grant the petition, vacate the decision below, and remand this case for further consideration. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *id.* at 181 (1996) (Scalia, J., dissenting) ("[w]e regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided" (emphasis omitted)). Among other things, this Court in *American Electric Power* may opine on whether and to what extent the political question doctrine applies where, as here and in that case, a plaintiff's cause of action raises non-constitutional claims and does not require courts to decide any particular constitutional questions. Accordingly, if the Court does not wish to grant certiorari at this time, it should, at a minimum, hold the petition until its decision in *American Electric Power*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held until this Court's decision in *American Electric Power*.

Respectfully submitted,

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